No. 18-481

IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,
Petitioner,

v.

ARGUS LEADER MEDIA, D/B/A ARGUS LEADER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY FOR PETITIONER

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REPLY FOR PETITIONER

INTRODUCTION

Respondent's brief makes one thing clear: Argus Leader does *not* want the Court to proceed. Hence its new justiciability arguments, predicated entirely on the Government's brief. But as the Government acknowledges, FMI's standing is secure and this case is justiciable. U.S. Br. 34-35. Mootness (the doctrine that *does* govern how later events affect justiciability) poses no obstacle either.

The syllogism remains simple. The judgment below mandates disclosure of FMI's members' information; it *causes* that *injury*. Reversal would undo—*redress*—that mandatory disclosure, allowing USDA to withhold the data. And the Government reiterates that it will continue to withhold the information at issue *unless* the Court affirms the judgment below.

Respondent's hunt for any way to avoid merits resolution reflects its inability to defend the *National Parks* substantial-competitive-harm test. Nothing in the brief justifies defining "confidential" differently from its ordinary,

universally understood meaning. And store-level SNAP-redemption data is "confidential," "commercial or financial information"—it entails individual store locations' sales data reflecting market share.

As to "confidential," respondent concedes that *National Parks'* rationale in creating the substantial-competitive-harm test is wrong, offering no defense of that approach. Instead, respondent invokes a purported common-law "term of art" to justify its proposed competitive-harm test: "trade secrets and other confidential commercial information." Resp. 29. This "term of art" is illusory. Any common-law provenance of that "term" went unmentioned in *National Parks*, Exemption 4 cases before and after *National Parks*, scholarly commentary, and FOIA's well-trodden legislative history. It does not even appear in Exemption 4 itself, whose text and structure are markedly different. What respondent has identified instead is an unremarkable concept—that unfair-competition plaintiffs suing their competitors must (like all tort plaintiffs) show harm. This truism sheds no light on the definition of "confidential." FOIA is not an unfair-competition tort statute; to the contrary, it allows *anyone* to obtain information regardless of purpose.

Respondent's ratification argument likewise fails. Congress has never reenacted Exemption 4. That other, later statutes reference or use language like Exemption 4's cannot retroactively change its meaning *when FOIA was adopted*. Moreover, nothing indicates that Congress embraced *National Parks*, much less picked a side in the ensuing Circuit splits. Congress uses Exemption 4's language to ensure consistent agency disclosure obligations throughout federal law, regardless of shifting interpretations.

Respondent ends with its most candid argument—that the consequences of giving Exemption 4 its plain meaning

justify denying Exemption 4 its plain meaning. Congress used FOIA's exemptions to strike a balance between disclosure and protection that courts must observe. And when information is less about what the government does and more about private conduct, the mandatory-disclosure theory is at its nadir.

Finally, respondent all but ignores FMI's second question presented, which the Court need not reach if it restores Exemption 4's plain meaning. But if a competitive-harm requirement survives, the Court would resolve at least five Circuit splits by adopting FMI's proposed standard. That test—drawn from other federal law involving competitive harm—would ask whether competitive harm is reasonably possible, regardless of its source, nature, or immediacy. Respondent offers no reason to repudiate that proposal—indeed, its main argument in the first question turned on unfair-competition law.

ARGUMENT

I. THIS CASE REMAINS JUSTICIABLE

Respondent contends that the Government's brief eliminates FMI's standing "for want of redressability." Resp. 13. Alternatively, again citing redressability, respondent asserts mootness. Resp. 17. Both contentions are meritless. As the Government stated, FMI "had Article III standing to appeal" because its injury "would be redressed if [it] prevailed on appeal." U.S. Br. 34-35. The Government's reaffirmation that it will withhold the data if the Court reverses forecloses a mootness finding. This Court's jurisdiction remains secure.

1. Standing is established at the outset, when "[t]he party invoking the Court's authority" satisfies Article III's familiar requirements: injury, causation, and redressability. *Camreta* v. *Greene*, 563 U.S. 692, 701 (2011). FMI's injury—the mandatory disclosure of its members' information—was actual, imminent, concrete and

particularized.[1] The district court's ruling caused that injury, which reversal would redress by eliminating the only thing requiring USDA to disclose the information.

Respondent also cannot meet its "formidable burden" to show that a case "litigated * * * for years" has become moot. *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). To establish mootness, respondent must prove that intervening events make it "impossible for a court to grant any effectual relief whatever to the prevailing party." *Campbell-Ewald Co.* v. *Gomez*, 136 S. Ct. 663, 670 (2016) (quotation omitted). Here, relief is virtually certain, as reversal will lead to continued nondisclosure. U.S. Br. 30-31, 35.

The Government's long course of conduct further confirms that, absent any order compelling disclosure, USDA would continue to protect the data. USDA litigated against respondent for years. After the district court issued its order, the Government alerted retailers to consider "possible judicial intervention."[2] Once FMI intervened, USDA successfully opposed as moot respondent's motion to compel disclosure. Dist. Ct. Doc. 148 at 2. It moved to amend the existing protective order to give FMI access to sealed portions of the record in prosecuting the appeal. Dist. Ct. Docs. 154, 155. Formal regulations that preclude disclosure, dating from 1978, were then *and still*

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[1] Respondent describes FMI's intervention as "improper," Resp. 16, but challenged it neither before the Eighth Circuit nor in its BIO; any complaint is thus forfeited and waived. In any event, "preventing the disclosure of commercially-sensitive and confidential information [under Exemption 4] is a well-established interest sufficient to justify intervention under Rule 24(a)." *100Reporters LLC* v. *U.S. Dep't of Justice*, 307 F.R.D. 269, 275 (D.D.C. 2014).

[2] *SNAP Retailer* Data, USDA (Jan. 18, 2017), https://web.archive.org/web/20170121025513/https://www.fns.usda.gov/snap-retailer-data.

are in effect. See U.S. Br. 27-31.[3]

2. Respondent's claim that the case has recently become moot (Resp. 17) rests on a misapprehension. Respondent understands the Government to state that USDA's *only* reason to exercise its discretion to withhold the data under Exemption 4 is that USDA believes that 7 U.S.C. § 2018(c) requires that result. Resp. 13, 17-23. The Government said no such thing. After USDA lost on its § 2018(c) argument, it litigated its Exemption 4 arguments *without* further reference to § 2018(c). See, *e.g.*, Dist. Ct. Doc. 61 at 19-31 & n.8. The Government has made clear in this Court, too, that its Exemption 4 arguments—and its intent to withhold the demanded information—do not turn on whether the Eighth Circuit's prior § 2018(c) ruling was correct. U.S. Br. 30.

The only potential change the Government signaled was *hypothetical*—and would not affect this case *even if* it

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[3] Respondent (at 16 & n.6) cites *Detention Watch Network* v. *Corrections Corp. of America*, No. 16-3141(L), 2017 WL 4122728, at *1 (2d Cir. Feb. 8, 2017)), which suggests that the appellants lacked standing because there was insufficient evidence that the Government endorsed their position and would redress their injury. 2017 WL 4122728 at *1. The Government expressly supports FMI's position. U.S. Br. 34-35. A "reverse FOIA" action under the APA, see U.S. Br. 33-34, would have required identifying adverse agency action, see 5 U.S.C. § 702, but the Government *supported* FMI's position before the district court, too. FMI met each Article III standing requirement and was a proper appellant, with or without the Government. See *Dow Jones & Co., Inc.* v. *U.S. Dep't of Justice*, 161 F.R.D. 247 (S.D.N.Y. 1995) (Sotomayor, J.) (permitting private-party intervenor to proceed without the Government in FOIA litigation after the agency indicated its intent not to appeal); *Didrickson* v. *U.S. Dep't of the Interior*, 982 F.2d 1332, 1338 (9th Cir. 1992) ("Generally, an intervenor may appeal from any order adversely affecting the interests that served as the basis for intervention, provided that the requirements of Article III are satisfied."). In any event, even assuming any flaw in FMI's intervention, respondent's failure to challenge it on appeal cures it.

had transpired. In a footnote, the Government stated that "*if* Congress had not recently amended § 2018(c) [in December 2018], [USDA] *might* have explored changing its position to permit the release of store-level redemption data *collected after* such a change." U.S. Br. 26 n.5 (emphases added). That is, if § 2018(c) had *not* been amended, USDA *might consider prospectively* revising its official nondisclosure policy, but only for data obtained *after* any theoretical regulatory change. Even if all that had happened, it would not affect USDA's position regarding the long-since-collected data at issue here.

Respondent's attempt to use the Government's brief as a justiciability "gotcha" is baseless. As the Government recently told this Court: "Although respondent's merits brief invokes the government's brief to support its position, the government supports petitioner both on the question of Article III jurisdiction in this case and on the application of Exemption 4 to the agency records at issue." Mot. for Leave to Participate 2.

3. Firing one last justiciability arrow, respondent hints that governmental discretion to disclose the data could block redressability. Resp. 16-17. Article III standing to challenge an order that *prevents* an agency from exercising its discretion to provide relief to a petitioner, however, is secure when there is evidence the agency would choose to do so.

In *Monsanto Co.* v. *Geertson Seed Farms*, 561 U.S. 139, 147-148 (2010), for example, petitioners challenged an injunction that prevented an agency from exercising its discretion to partially deregulate petitioners' product. The agency had previously granted this relief to petitioners, and its statements during the litigation indicated it believed doing so was appropriate. There was thus "more than a strong likelihood that [the agency] would partially deregulate [petitioner's product] were it not for the

District Court's injunction." *Id.* at 152; see also, *e.g.*, *Bennett* v. *Spear*, 520 U.S. 154, 170-171 (1997) (recognizing standing to challenge a recommendation that *required* an agency to impose water-use restrictions that the agency had not previously imposed, and concluding that petitioners' injury would "'likely' be redressed" by a favorable ruling). Redress here is far more certain than "likely."

* * *

Respondent and several *amici* make clear their desire that the Court not reach the merits. But no justiciability barrier prevents the Court from resolving the merits questions that it granted certiorari to decide.

II. "CONFIDENTIAL" HAS A WELL-ESTABLISHED PLAIN MEANING THAT DOES NOT REQUIRE SHOWING COMPETITIVE HARM

The Eighth Circuit emphasized that its judgment turned on its conclusion that disclosure was not "likely to cause *substantial* competitive harm." Pet. App. 5a (original emphasis). Respondent never asserts, let alone defends, that substantiality requirement—it even *omits* the word "substantial" when it quotes the actual *National Parks* test, Resp. 24 n.10, and champions a new competitive-harm standard instead.[4]

Indeed, respondent barely mentions *National Parks & Conservation Association* v. *Morton*, 498 F.2d 765 (D.C. Cir. 1974), at all—despite urging the Court to uphold what lower courts have done "[f]or over 40 years," Resp. 24. Respondent also repudiates *National Parks*' sole rationale—legislative history, which respondent excoriates as "notoriously flawed," "tortured," and "obfuscating." Resp. 51. It instead offers a series of novel tests—each of which is meritless and turns on simply *some* competitive-harm

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[4] The only time the brief links "substantial" with "competitive harm" is in a footnote parenthetical quotation. Resp. 63 n.29.

showing. *Even if* the Court agrees with respondent, therefore the *most* respondent could win is vacatur and remand.[5]

The Court should instead reverse, because none of respondent's attempts to rewrite Exemption 4 remotely overcomes the plain meaning.

A. No common-law "term of art" supports respondent's proposed competitive-harm test

Respondent begins by urging the Court to disregard the statute's plain meaning, arguing that "trade secrets and other confidential commercial information" was "an established common-law term of art" when FOIA was enacted. Resp. 29. Conveniently, that "term" encompassed only information whose disclosure would cause competitive harm. Thus, Congress must have intended a harm requirement in Exemption 4. *Ibid.*

"The canon on imputing common-law meaning applies only when Congress makes use of a statutory *term* with established meaning at common law." *Carter* v. *United States*, 530 U.S. 255, 264 (2000) (original emphasis). For that reason, the canon has no application where "Congress simply describes [a concept] analogous to a common-law [principle] without using common-law terms," *id.* at 265, or adopts text that is merely similar to a preexisting term of art, *e.g.*, *Bruesewitz* v. *Wyeth LLC*, 562 U.S. 223, 234-235 (2011). Congress *did not even use* respondent's term—"trade secrets and other confidential commercial information"—in Exemption 4. The actual text is "trade secrets *and* commercial or financial information obtained from a person and privileged or confidential," 5 U.S.C. § 552(b)(4) (emphasis added); see *Bruesewitz*, 562 U.S. at

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[5] And as the Government observes, even if Exemption 4 does not apply, the Court should still vacate and remand for consideration of § 2018(c)'s recent amendment. U.S. Br. 35 n.7.

236 ("linking independent ideas is the job of a coordinating junction like 'and'"). The omission of the supposed "term" alone defeats any claim that Congress intended to adopt that term's alleged meaning.[6]

Respondent's term of art is also a fiction. Respondent identifies no legal dictionary including the phrase "trade secrets and other confidential commercial information," or the shorter "confidential commercial information" variant that respondent sometimes uses—and "surely that's a first hint the phrase wasn't then a term of art bearing some specialized meaning." *New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 539-540 (2019). Respondent (at 30-31) cites §§ 757 and 759 of the contemporaneous Restatement (First) of Torts (1939)—which do not use the phrase. Even a Westlaw search of state and federal cases for "confidential commercial information" before 1966 yields zero results. Cf. *Hall* v. *Hall*, 138 S. Ct. 1118, 1125 (2018) (applying the common-law meaning of a term "with a legal lineage stretching back at least to * * * 1813").

Respondent identifies several cases mentioning trade secrets and business or commercial information in the same sentence. Resp. 31 n.15. But that is *all* that these cases do. None uses respondent's term of art, defines "confidential," or claims that there was a common-law understanding that information is "confidential" only if its disclosure would cause competitive harm.

In contrast, the sources above *do* use the word "confidential"—and do so consistent with its ordinary meaning and without any requirement of competitive harm ("substantial" or otherwise). See FMI Br. 15-22 & n.11

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[6] Exemption 4 also protects the information as "financial" information. *E.g.*, Pet. App. 15a. Respondent never claims that the common law protected *financial* information only if disclosure would cause competitive harm. So even if respondent's stated argument had merit, it could not prevail.

(dictionaries, cases, and other examples establishing that "confidential" means secret and not publicly disseminated); Restatement (First) of Torts § 757 cmts. a, b, h, & j (1939) (using "confidential" and "secret" interchangeably, and the phrases "person to whom the secret was entrusted in confidence," "abuse of confidence," and "breach of confidence"). Congress's use of a word with a well-established *plain* meaning—and its failure to use or define any contrary term of art—resolves this case.

Finally, even aside from the missing "term of art," no evidence suggests that Congress—*sub silentio*—incorporated into Exemption 4 *only* the particular unfair-competition cause of action upon which respondent relies. Respondent claims that when FOIA was enacted, a business could bring an unfair-competition claim against a competitor that had improperly obtained its information and thereby harmed it. Resp. 30-31. Surely true, but Exemption 4 does not purport to codify unfair-competition law (or any other tort). Anyone—not just competitors—may use FOIA to obtain information in the Government's possession.

Had Congress intended to incorporate specialized legal rules into Exemption 4, or add a harm requirement, FOIA would say so. *The very next two exemptions* show as much. See 5 U.S.C. § 552(b)(5) (exempting governmental "memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency"); 5 U.S.C. § 552(b)(6) (exempting "personnel and medical files and similar files" whose disclosure "would constitute a clearly unwarranted invasion of personal privacy"). FOIA's exemptions are interpreted according to their plain text, and thus not necessarily co-extensive with (even *actually* well-established) common law. *NARA* v. *Favish*, 541 U.S. 157, 170 (2004) ("We have observed that the statutory privacy right protected by Exemption 7(C) goes beyond the common law and the

Constitution.").[7]

Instead, Exemption 4 permits the Government to withhold—without limitation—"commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The fact that *other* statutes or common-law actions might impose additional requirements neither dictates what this statute means nor changes the plain meaning of "confidential." See *United States* v. *Wells*, 519 U.S. 482, 491-493 (1997) (declining to hold the phrase "false-statement" in a statute had a specialized common-law meaning that included the concept of materiality merely because some common-law crimes involving false statements included materiality as an element, and instead interpreting the phrase using its "natural reading"); *Carter*, 530 U.S. at 264-265 (rejecting the assumption that statutory crimes "similar to the common-law crimes of robbery and larceny" implicitly embedded all "the same elements as their common-law predecessors").

Respondent's claim, raised for the first time in this Court, that Exemption 4 incorporates a term of art and mimics a particular common-law cause of action is novel.[8] Nothing in the statute or the common law supports the argument—nor does respondent cite *any* legislator, court,

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[7] Even assuming the narrow-construction doctrine applied, it could only resolve ambiguity—not supplant a word with a well-established plain meaning. FMI Br. 32 n.19; Retail Litigation Center *Amicus* Br. 5-16.

[8] Indeed, asserting that "confidential commercial information" is a unified term of art is inconsistent with respondent's prior litigation position. USDA and respondent "stipulated that the information is commercial or financial" but disputed whether it was "confidential." Pet. App. 15a. The individual words could not be separately analyzed if they were indivisible parts of a term of art. Respondent, like every court to apply Exemption 4, well understood previously that "confidential" could and should be assessed distinctly.

or scholar who, over Exemption 4's fifty-three years, has noted this supposedly well-established common-law heritage.[9] The Court should reject this meritless argument and uphold the plain text.

B. "Confidential" has an unambiguous plain meaning that lacks any harm element

Respondent does not dispute that the plain meaning of "confidential" is "secret and not publicly disclosed." But it fixates on a subset of that definition—information that is "objectively confidential *in nature*" and whose disclosure is "likely harmful." Resp. 43 (original emphasis). Such information, if kept secret, may certainly be "confidential." But respondent lacks even one authority for categorically substituting this subset for the whole.[10]

Simply put, it is unsurprising that information whose disclosure would yield any kind of harm (not just competitive) would be treated confidentially, but that hardly establishes that *only* such information is confidential. Information's *secrecy* is what makes it "confidential," not the *reasons* someone keeps that information secret. Cf. *Carpenter* v. *United States*, 484 U.S. 19, 26-27 (1987) (affirming insider-trading conviction where disclosure of newspaper's confidential information caused no "monetary loss, such as giving the information to a competitor" because "exclusivity is an important aspect of confidential business

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[9] Conversely, courts have considered common law to assess the meaning of "privileged" or scope of "trade secrets" (and the common law of trade secrets was *not* well-established when FOIA was enacted, Pet. 20-21).

[10] The dictionary definitions respondent cites, Resp. 27 n.11, merely confirm that "confidential" and "confidence" are related terms ("of the nature of confidence"), or that confidentiality is associated with "intimacy"—a term that means private (generally in reference to deeply personal information) and requires no showing of harm. *E.g.*, Webster's New International Dictionary 1301 (2d ed. 1960).

information").[11]

Respondent contends that the plain-text interpretation of Exemption 4 makes the standard for "confidential" unduly subjective, making *submitters* the final arbiters of what is confidential. *E.g.*, Resp. 44-45. To the contrary, parties claiming the exemption must prove, for example, a custom of keeping the information at issue secret and that the information was in fact considered and kept secret—an objective and verifiable standard. See *Critical Mass Energy Project* v. *NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992) *(en banc)* (describing "would customarily not be released to the public" as an "objective" test).[12]

Respondent's attempt to turn *Department of Justice* v. *Landano* to its advantage likewise fails. Resp. 43-44. *Landano* supports petitioner: it held that "confidential" warranted its plain meaning in FOIA Exemption 7, which protects records that could reasonably be expected to

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[11] Some *amici* implore the Court to forego consideration of this case (or embrace the competitive-harm test) because Congress amended FOIA in 2016 to specify that in future cases agencies "shall withhold information • • • only if (I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption • • •; or (II) disclosure is prohibited by law." 5 U.S.C. § 552(a)(8)(A)(i). That language says nothing about what Exemption 4 means by "confidential," and releasing "confidential" information (as this Court defines it in this case) to someone else *is itself* the interest that would be harmed. Only if respondent's atextual interpretation of the statute prevails will that interest be limited to "competitive harm."

[12] Respondent likewise attacks the Government's application of the plain-text interpretation as giving "even a low-ranking" federal employee unchecked power to bestow confidentiality, when FOIA precludes withholding by fiat. Resp. 60. Exemption 4's "obtained from a person" requirement ensures that only *non-governmental* information (already at the outer fringe of FOIA's goal of governmental transparency) can benefit from Exemption 4 at all. The rogue-bureaucrat worry is baseless, too—the assurances here came from longstanding, officially-promulgated regulations. U.S. Br. 27-31.

disclose the identity of a confidential law-enforcement source. 508 U.S. 165, 174 (1993). The Court then separately addressed a second issue: when a source can reasonably *infer* that the Government has promised to keep the communication confidential. *Id.* at 172 (identifying the two issues); *id.* at 179-180 (analyzing the second issue). Respondent's claim that *Landano* recognized that "confidential" is only an "objective" term of the sort respondent demands here mistakenly focuses on the analysis of this second issue. Resp. 43-44 (citing 508 U.S. at 179). This Court has never injected a harm requirement into the ordinary word "confidential," in *Landano* or elsewhere. See FMI Br. 19 n.11 (gathering cases); *Carpenter*, 484 U.S. at 26-27.

To bolster its odd interpretation of "confidential," respondent cites statutes—but those prove that when Congress intends for legislation to apply only to confidential information that is *also* "damag[ing]" or "sensitive," it specifically includes such an element in the statute. See Resp. 48 (excerpting statutes). Respondent's examples from "common parlance" and judicial opinions likewise fail. It is unremarkable that one would assume, unless told otherwise, that another person's bank PIN is kept private, or would emphasize the secrecy of particularly important information by referring to that information as "*highly* confidential." See Resp. 45-48 (emphasis added).

Lastly, respondent turns to inapposite civil-discovery and judicial-sealing standards. When Congress intends to import discovery's specialized rules into FOIA, it does so explicitly: Exemption 5 exempts documents "that would not be available by law to a party other than an agency in litigation with the agency," 5 U.S.C. § 552(b)(5).[13] To

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[13] Even Exemption 5, moreover, does not to incorporate all discovery rules and privileges. See *FOMC* v. *Merrill*, 443 U.S. 340, 354 (1979).

protect confidential information under Federal Rules of Civil Procedure 26 and 45 (both of which post-date FOIA), a party must show harm as an *additional* requirement, not as part of establishing confidentiality. Rule 26(c)(1) requires a party seeking a protective order for any type of information to prove "good cause." The 1991 Advisory Notes to Rule 45(d)(3)(B) specify that a district court may quash a subpoena requiring the disclosure of "confidential * * * commercial information" if compliance would be "unnecessary or unduly harmful."[14] Thus, in applying the "qualified [evidentiary] privilege for confidential commercial information" in *FOMC* v. *Merrill*—an Exemption 5 case—this Court first analyzed whether the information was "confidential" and "commercial," 443 U.S. 340, 361 (1979), and then *separately* analyzed whether the harm from disclosure justified applying the evidentiary privilege, *id.* at 363.

Judicial-sealing standards stem from the presumption that court documents should be publicly available. *Nixon* v. *Warner Commc'ns, Inc.*, 435 U.S. 589, 597-598 (1978). There is no common-law or constitutional right to information provided by "FOIA laws," which "are of relatively recent vintage." *McBurney* v. *Young*, 569 U.S. 221, 234 (2013). Bankruptcy Code § 107 governing sealing "confidential commercial information" in bankruptcy records has been interpreted to include *both* a confidentiality and a harm requirement, *In re Orion Pictures Corp.*, 21 F.3d 24, 27 (2d Cir. 1994), but it was enacted ten years after FOIA and has no relevance to Exemption 4's use of "confidential." See 11 U.S.C. § 107.

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[14] Respondent also references Federal Rule of Criminal Procedure 17(c)(3), which is "substantially the same" as Civil Rule 45. Fed. R. Crim. P. 17 Advisory Committee's Note to 1944 Amendments.

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Respondent clearly finds the textual standard to be insufficiently stingy, but none of its arguments gives it warrant to redefine "confidential" to mean something other than information that is secret and not publicly disclosed.

C. Congress has not ratified *National Parks*

Respondent also contends that the Court need not even assess what "confidential" means—it should preserve *National Parks* because Congress allegedly ratified that decision by subsequently enacting statutes that reference or use language like Exemption 4's. But ratification presumes that Congress was aware of a well-settled judicial interpretation of a statute, and then adopted that interpretation by *reenacting* that statute using the same or substantially similar language. *Helsinn Healthcare S.A.* v. *Teva Pharms. USA, Inc.*, 139 S. Ct. 628, 633-634 (2019). Congress has never reenacted Exemption 4 since its original passage in 1966. Exemption 4 must thus be interpreted according to what it meant when enacted in 1966—not what subsequent Congresses may have intended when passing other, later statutes.[15] See *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978) (ratification may occur where "Congress adopts a new law incorporating sections of a prior law * * * insofar as it affects the new statute").

Respondent's argument also neglects the timeline over which the law has developed. The D.C. Circuit decided *National Parks* in 1974, breaking with prior judicial interpretations of the statute. FMI Br. 21. Over the years, other Circuits followed. Pet. 14 n.10 (gathering cases).

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[15] Respondent previously relied on a 1978 House Committee Report to make this ratification or acquiescence argument—now replaced with the underlying hearings and relegated to a footnote. BIO 15-16; Resp. 40 n.19. As FMI previously noted, that Report declined to take a position on *National Parks*' merits and regardless is irrelevant to interpreting a statute that a prior Congress enacted. Cert. Reply 4.

Even if ratification *were* a valid theory here, respondent does not identify when *National Parks* became such an unquestioned, well-settled judicial interpretation that Congress could be presumed to have adopted it. That surely could not have occurred by 1975, when respondent's list of statutes begins. See *Jama* v. *ICE*, 543 U.S. 335, 349 (2005) (congressional ratification applies only if Congress reenacted the same statute without change, and "the supposed judicial consensus [is] so broad and unquestioned that [the Court] must presume Congress knew of and endorsed it").

Respondent also does not identify *which* version of *National Parks* Congress supposedly endorsed. That test has spawned numerous Circuit splits. Pet. 25-29. The D.C. Circuit substantially altered it in 1992 to define "confidential" differently based on whether the requested information was voluntarily submitted to the government. *Critical Mass*, 975 F.2d at 876-877; see Pet. 28-29. When Congress enacted the 37 statutes included in respondent's appendix that post-date *Critical Mass*, did it follow the D.C. Circuit or others? When there is no indication of which potential judicial interpretation Congress presumably adopted, the presumption is that it stayed out of the matter. *E.g.*, *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 525 (1984).

Respondent's list of statutes—enacted when Circuits were gradually and inconsistently interpreting Exemption 4—illustrate that it is impossible, indeed illogical, to presume that Congress ratified any particular judicial interpretation of Exemption 4. Instead, it is far more likely that Congress consistently referenced Exemption 4 or used the same basic phrasing in other statutes to ensure that agencies' disclosure obligations remain consistent, regardless of shifting judicial interpretations.

Finally, respondent contends (Resp. 39-40 & n.19) that

ratification applies because Congress regularly reviews FOIA (citing reports on Exemption 4 from 1977 and 1984) and has amended *other* FOIA provisions. Legislative-acquiescence arguments are at "best only an auxiliary tool" that cannot overcome the plain meaning of Congress's words. *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 533-534 (1947).

Moreover, FOIA's amendments have been limited to modifying particular exemptions or clarifying procedural aspects of the law. This Court has declined to ascribe significance to Congress's inaction where "Congress has not comprehensively revised a statutory scheme but has made only isolated amendments," since "[i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation." *Alexander* v. *Sandoval*, 532 U.S. 275, 292 (2001) (internal quotation marks omitted). Congress could choose to revise Exemption 4—but it has not. It remains this Court's duty to interpret the statute's language.

D. Giving "confidential" its plain meaning advances FOIA's purpose

Respondent opposes giving "confidential" its ordinary meaning because doing so would "threaten[] serious damage to FOIA's core objective of shedding light on 'what the government is up to,'" particularly regarding government spending. Resp. 53 (quoting *Favish*, 541 U.S. at 171-173). But policy arguments cannot rewrite plain statutory text. See *SAS Inst., Inc.* v. *Iancu*, 138 S. Ct. 1348, 1358 (2018).

FOIA favors government transparency but does not mandate disclosure at any cost. Congress balanced these interests by limiting Exemption 4 to information "obtained from a person"—*i.e.*, *not* government information.[16]

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[16] Respondent properly abandoned its certiorari-stage assertion that

Accordingly, most examples respondent offers would not change under a plain-text interpretation. For example, information on bank-bailout funds, Resp. 54-55, was ordered disclosed because it reported "actions that were taken by the government." *Bloomberg, L.P.* v. *Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 149 (2d Cir. 2010). Likewise, the CFPB request, Resp. 56, was for "[a]ll records by or between CFPB employees" regarding the issue—not information obtained from a person. *Cause of Action Inst.* v. *CFPB*, No. 16-2434 (D.D.C. Dec. 13, 2016), Dkt. 1, ¶ 14.

But even if Exemption 4's plain reading gives the government discretion to withhold some private information, that is simply the balance Congress struck. If certain categories of such information are so critical that they warrant disclosure despite Exemption 4, that policy judgment is surely for Congress alone. Until Congress acts, however, its unambiguous statutory language governs. See *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) ("[T]he parties and their *amici* manage to present many and colorable arguments both ways on them all, a fact that suggests to us for certain but one thing: that these are matters for Congress, not this Court, to resolve.").

Even government spending—unquestionably linked to a tradition of disclosure—does not justify *categorical* disclosure under the statute. Nor do all figures related to government spending actually reflect government action. See, *e.g.*, *McDonnell Douglas Corp.* v. *U.S. Dep't of the Air Force*, 375 F.3d 1182, 1193 (D.C. Cir. 2004) (describing

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SNAP data is not "obtained from a person"—an already-forfeited and plainly wrong contention. See Cert. Reply 9-11. While the SNAP data was obtained from EBT processors, not directly from retailers, Resp. 64-65, EBT processors are contractually required to maintain SNAP-data confidentiality. See FMI Br. 4.

line-item prices in a government contract, unlike competing bottom-line bids, as "a matter of indifference to the purpose of the FOIA"). Retailers' store-level SNAP data is one such example. The federal government's role in SNAP is to fund benefits for low-income beneficiaries and approve retailers to participate in the SNAP program. 7 U.S.C. § 2013(a). The government already releases SNAP-funding information[17] and identifies SNAP-approved retailers.[18]

The amount of SNAP redemptions at a *particular* store, in contrast, is not the result of any government action; it depends on and reflects SNAP beneficiaries' choices to patronize that location. Releasing such information thus would not inform the public what the *government* is doing.[19]

Giving "confidential" its ordinary meaning also supports FOIA's stated goal of prompt resolution. 5 U.S.C. § 552(a)(6). The *National Parks* standard often results in cases oscillating repeatedly between the district and circuit courts. *E.g.*, *Washington Post Co.* v. *U.S. Dep't of*

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[17] FMI Br. 5 n.4 (citing SNAP, https://www.fns.usda.gov/pd/supplemental-nutrition-assistance-program-snap (last visited March 29, 2019)).

[18] Where Can I Use SNAP EBT? https://www.fns.usda.gov/snap/retailerlocator (last visited March 29, 2019).

[19] The Government mistakenly states that because the SNAP data "corresponds to the government's own payments of federal funds," it reflects governmental action. U.S. Br. 25-26. The Government's prior representation to the district court was correct—that the data "does not speak towards Government spending *at all*." Reporter's Record II:448 (emphasis added). Any payment from the Government is indifferent to the location. There is no payment from the Government to retailers, only *reimbursement*, through the EBT processors, for the selections made by SNAP beneficiaries. See, *e.g.*, JA 79, 81-82; Reporter's Record I:37-39. Store-level SNAP-redemption data memorializes actions *SNAP beneficiaries* take.

Health & Human Servs., 865 F.2d 320, 328 (D.C. Cir. 1989) (remanding to resolve a factual question after reversing the trial court's prior three orders). Moreover, as respondent agrees, commercial interests dominate FOIA. Resp. 58. The sheer volume of such requests dramatically decreases agencies' ability to timely respond, causing delays that likely have deterred journalists from using FOIA for its *intended* purposes. Kwoka, *FOIA, Inc.*, 65 Duke L. Rev. 1361, 1422-1424 (2016). Especially pernicious are those requesters that resell FOIA records, transforming FOIA into "a mechanism for transferring wealth from the federal government to private enterprise," an "unjustified form of corporate subsidy never contemplated, much less endorsed, by Congress." *Id.* at 1415. Respondent's characterization of commercial requests as a "feature, not a bug" contradicts its exultation of FOIA as key to the public's right-to-know, because the former strangles the latter.

Finally, as a pragmatic matter, the plain text would reduce the administrative burden on the government and courts. Exemption 4 accounts for only 1.39% of total exemption usage.[20] Nonetheless, though comparatively few FOIA requests result in litigation, "[t]he issues most commonly tried in FOIA cases arose under exemption 4." Kwoka, *The Freedom of Information Act Trial*, 61 Am. U. L. Rev. 217, 269 (2011). The current test has also spawned five Circuit splits that would be resolved by restoring Exemption 4 to its plain text. See Pet. 24-29.

III. If Any Competitive-Harm Test Survives, Respondent Presents No Meaningful Objections To FMI's Proposed Reformation

FMI proposed that if the Court chooses to depart from

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[20] Summary of Annual FOIA Reports for Fiscal Year 2017, at 8, https://www.justice.gov/oip/page/file/1069396/download.

Exemption 4's plain language in the vein of *National Parks*, it should strip away decades of accumulated gloss and return the test to its roots: an inquiry into "the possibility that disclosure will harm legitimate private or governmental interests in secrecy." *National Parks*, 498 F.2d at 770. Respondent refuses to join issue with most of petitioner's arguments, insisting that there is "no basis to water down the longstanding competitive-harm standard." Resp. 61 (capitalization revised). Instead, respondent repeats its deficient "common law" and ratification arguments.

Respondent's use of the "common law" to defend against reformulating the competitive-harm test is ironic. If, as respondent suggests, unfair-competition law inspired Congress in crafting Exemption 4, then Exemption 4 should be read in harmony with the federal unfair-competition statute. See FMI Br. 48 (proposing Robinson-Patman Act standards to ascertain competitive harm). Respondent has no rebuttal.

Respondent next suggests that the well-recognized lower-court chaos can be ignored as the expected result of a test that incorporates the adverb "likely." Resp. 63. But the conflict below involves more than gradations of "likelihood." Respondent's brief ignores the certiorari-stage dissenting opinion in *New Hampshire Right to Life* v. *Department of Health and Human Services*, 136 S. Ct. 383, 383-385 (2015), which catalogues how lower courts disagree about even the *factors* to consider in assessing "competitive harm." See also FMI Br. 49-50.

Respondent's own *amici* confirm this confusion. Seven advocate for a competitive-harm test—yet offer four different versions of it. Respondent cannot maintain that *National Parks* requires no elucidation given the internecine battle over its meaning.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted.

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